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In the Supreme Court
OF THE
United States

October Term, 1950

No. 737

ORESTUS CAVNESS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Orestus Cavness, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the final judgment, entered March 5, 1951, affirming the judgment of the United States District Court for the District of

Hawaii. R. 635. A petition for rehearing was denied April 12, 1951. R. 636.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Court of Appeals is contained in the record. R. 627-635. It is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, 28 U.S.C., sec. 1254 (1).

SUMMARY STATEMENT.

Petitioner was indicted on the charge of purchasing 8 capsules of cocaine in violation of the narcotic laws of the United States, 26 U.S.C., sec. 2553 (a). R. 2-3. A jury found him guilty. R. 23, 534-536. By the judgment and commitment he was sentenced to imprisonment for two years. R. 33-34.

The arrest of petitioner on July 19, 1949, was preceded by a search warrant issued July 12, 1949, authorizing a narcotic agent (Wells) to search "a one story wooden-frame building located at 3811 Leahi Avenue, Honolulu, T.H.," occupied by petitioner as a home. R. 5-7. The search warrant did not authorize a search of petitioner's person. In his return to the search warrant narcotic agent Wells recited that the involved

narcotics were taken "pursuant to the warrant" following a search of "(the person) (the premises) described in the warrant". R. 7. A motion to suppress the evidence thus seized was made before a jury was impaneled. R. 8-12. It was heard by the court during the course of the trial and denied. R. 264-268. Later on, the involved narcotics were admitted in evidence. R. 270, 347, 349, 367-368.

Although the search warrant was issued July 12, 1949, and had reference to contraband then allegedly at petitioner's said home, R. 5-7, narcotic agent Wells made no effort to execute the search warrant until July 19, 1949. At 2:40 p.m. of that day in company with several police officers Wells went to premises across the street from 3811 Leahi Avenue, the premises to be searched, and kept the latter premises and activities thereon under surveillance until after 5:38 p.m. R. 51-52. Petitioner was home. Wells saw him in and about the premises and watched him drive away in an automobile around 3:55 p.m. R. 51. When petitioner returned in the automobile at 5:38 p.m., Wells and the police officers descended upon him. While petitioner was still in the automobile he was told by Wells that the latter had a search warrant "to search the premises". R. 52. And when petitioner in attempting to get out of the automobile shoved Wells aside, a scuffle ensued and the police officers proceeded to "subdue" petitioner. R. 52-53, 118, 122. In the subduing process, the narcotics petitioner, who is a negro (R. 4), sought to suppress as evidence were blackjacked from his person. R. 111. He received injuries consisting of a scalp

wound, a black eye, a bruised cheek, and a cut lip, requiring emergency hospital treatment which he received on the way to the police station at 8:03 p.m. R. 502-597. Petitioner was not placed under arrest before the scuffle, during its progress, or at its conclusion. R. 122. He was handcuffed and taken inside his home wounded and bleeding. R. 112-114, 129. There a copy of the search warrant was served upon him by Wells, and some time later Wells placed petitioner under arrest. R. 121, 129. No narcotics were found when the premises were searched. Petitioner's conviction rested upon the property blackjacked from his person.

One of the police officers who "subdued" petitioner volunteered the statement as a government witness that petitioner was "hopped up" at the time. R. 402. In response to the motion of petitioner's counsel to strike the statement as "highly prejudicial, entirely uncalled for, and unresponsive, and unfair", the court ruled, "Definitely it may go out, and the jury is instructed to disregard it". R. 403. But a motion for mistrial because of this highly prejudicial statement was denied. R. 403, 431-432.

On motion for new trial, petitioner urged and the court investigated an irregularity in the proceedings of the jury after the cause had been submitted to the jury for deliberation. R. 451-610. This consisted in one of the jurors separating from the other jurors and, with the permission of the United States Marshal having custody of the jury, making certain somewhat cryptic telephone calls from the Marshal's office. The motion for new trial was denied. R. 610-616.

QUESTIONS PRESENTED.

1. Was the evidence upon which petitioner was convicted secured as the result of an unreasonable search and seizure?

2. Was petitioner denied a fair trial by prejudicial misconduct of a government witness and by irregularity in the proceedings of the jury?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. THE DECISION HEREIN IS NOT UNIFORM WITH THE DECISIONS OF THIS COURT RESPECTING CONVICTIONS BASED UPON EVIDENCE SECURED AS THE RESULT OF AN UNREASONABLE SEARCH AND SEIZURE.

Isolated, the case of petitioner is a small one and of little importance involving, as it does, a petty narcotic violator. But the fundamental right involved is large and of great importance—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (Const., Amend. 4). In the preservation of that right this court uniformly condemns arrests and convictions based upon evidence secured or seized by unlawful search of person or property. (*United States v. Di Re,* 332 U.S. 581; *Johnson v. United States,* 333 U.S. 10; *Trupiano v. United States,* 334 U.S. 699; *McDonald v. United States,* 335 U.S. 451.)

The decision herein does not square with the foregoing decisions. A valid search of the house at 3811 Leahi Avenue pursuant to the search warrant of July 12, 1949, did not depend upon the presence of peti-

tioner at the premises. (*Trupiano v. United States,* 334 U.S. 699, 707-708.) Nor did it depend upon reading or exhibiting the search warrant to petitioner or serving a copy upon him. (*Nordelli v. United States,* 9 Cir., 24 F. 2d 665, 667.) Regardless of petitioner's presence of 3811 Leahi Avenue or his absence therefrom, Wells could have readily and lawfully executed the search warrant at any time after its issuance on July 12, 1949. There is no room in this case for a conclusion that petitioner was resisting execution of a search warrant at the time he was blackjacked. Nor is there any room for a conclusion that he was resisting an arrest at the time. The only sound conclusion is that he was arrested and convicted because of evidence that was unlawfully blackjacked from his person during execution of a search warrant authorizing only search of property. The decision herein, then, is plainly intolerant to the cited decisions of this court.

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2. **PETITIONER WAS DENIED A FAIR TRIAL BY PREJUDICIAL MISCONDUCT OF A GOVERNMENT WITNESS AND BY IRREGULARITY IN THE PROCEEDINGS OF THE JURY.**

It is a rule well recognized in federal practice that the volunteer statements of a witness may be so harmful to the case of a defendant in a jury tried action that admonitions to the jury cannot remove the harm, and the granting of a mistrial is mandatory. (*Beck v. Wings Field, Inc.,* 3 Cir., 122 F. 2d 114, 117.) A fair trial demanded the application of that rule here.

The evidence was undisputed that petitioner, a negro, was blackjacked, wounded, and subdued by police officers at the time the search warrant was executed. Whether the officers acted brutally and without justification was a vital and perhaps decisive issue in the case. A witness for the government, a police officer and one of the "subduers", volunteered the statement that petitioner was "hopped up" at the time. R. 402. That the witness was thereby informing the jury that petitioner was under the influence of narcotics at the time and the police officers had to use force to restrain him, cannot be doubted. Once poison of that character was spread admonitions would not eradicate it. Its tainting effect would inevitably persist no matter what a trial judge might say to the jury about it. A fair trial demanded a mistrial. A sound administration of criminal justice requires a reversal of the conviction to which such poison contributed.

Turning to irregularity in the proceedings of the jury, the record discloses that the court room was converted into the jury room for deliberations of the jury on the submission of the cause. Without authority from the trial judge, the United States Marshal having custody of the jury assumed authority and permitted one of the jurors to leave the jury room, separate from the other jurors, and go to the marshal's office to make a telephone call. The juror took advantage of the opportunity to make a further telephone call from the marshal's office. At the hearing of the motion for new trial the marshal, two of his deputies, and the juror testified respecting the irregu-

larity, and their various versions lacked harmony in many respects. R. 451-610.

On the surface, the telephonic conversations as reconstructed by the juror were innocuous enough, but from the very nature of the conversations it is unreasonable to suppose that no reference to or comment upon the case in which the juror was sitting and about to deliberate was made during the conversations. Where irregularities in the proceedings of a jury are involved, it would appear that surface indications should not furnish a safe or proper guide. The fact remains that officials charged with the custody of the jury and the duty of preventing improper influences from exerting themselves upon the jury, relaxed that custody and created opportunity for improper influences to exert themselves. The situation here is not one where the performance of official duty may be presumed, for the officials say in the record that they did not perform their duty. And the fact also remains that those participating in the irregularity differ in their versions as to what actually occurred and it is plain that what actually occurred has not and cannot be ascertained.

The sound rule applicable to the situation here is that the irregularity must be deemed prejudicial and require the granting of a new trial if there is a *reasonable possibility* that injustice has been done. (*Snyder v. Massachusetts,* 291 U.S. 97, 113; *Little v. United States,* 10 Cir., 73 F. 2d 861, 865-866.) That reasonable possibility existed and persisted in this case. The

trial court relaxed the rule of reasonable possibility in denying the motion for new trial. The court of appeals approved that relaxation by affirming the judgment. A sound administration of criminal justice requires a restoration of the rule and a reversal of the conviction to which the relaxation contributed.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit and that the judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
May 4, 1951.

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